

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN,

Plaintiff,

NOTICE OF MOTION

vs.

CITY OF NEW YORK, et al.


Civil No. 07-CV-2996

Defendants.

PLEASE TAKE NOTICE, that upon the affidavit of Arienne J. Irving, Esq., sworn to on the 8th day of November, 2007, a motion pursuant to FRCP 15(c)(3) and pursuant to FRCP 4(m) will be made before the Hon. Alvin K. Hellerstein, USDJ, at the United States Courthouse, 500 Pearl Street, New York, New York at a date and time to be determined by the Court for an order granting leave to plaintiff to serve the proposed *first* amended complaint as presented herein and to enlarge the time to serve defendants for good cause shown. The grounds for this motion are fully set forth in the accompanying attorney affirmation.

The above entitled action is brought by the plaintiff for violations of his rights as guaranteed by the 8th Amendment to the United States Constitution.

DATED: November 8, 2007
New York, New York



Arienne J. Irving, Esq. (AI4453)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN

Plaintiff,

vs.

THE CITY OF NEW YORK, et al.

Defendants.

**AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO SERVE
AMENDED COMPLAINT**

Civil No. 07-CV-2996

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ARIENNE J. IRVING, ESQ., an attorney duly admitted to practice law in the State of New York, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of New York and admitted to the United States District Court for the Southern District of New York, and am an associate in the law firm of ROBERT M. SIMELS, P.C., attorneys for the plaintiff, JAMES MARTIN, in the proceedings herein and as such, am fully familiar with the facts and circumstances surrounding this litigation.

2. This affidavit is in support of the plaintiff's motion for leave to amend complaint and for leave to enlarge the time for service. A copy of the proposed amended complaint is annexed hereto as *Exhibit "A."*

3. This action was commenced against defendants City of New York (hereinafter "CITY"); the New York City Department of Corrections (hereinafter "DOC"); and Captain Matos, Captain Vasquez, Office Nieves, Deputy McCovey (hereinafter collectively referred to as "OFFICERS") by service of a summons and complaint on or about May 3, 2007. Upon defendant

CITY's request OFFICERS were personally served with summons and complaint on or about August 1, 2007 (Matos and McCovey) and August 23, 2007 (Nieves and Vasquez). Issue was duly joined herein by the service of an answer by all parties.

4. This action is brought by plaintiff for violations of his Constitutional rights, for assault and battery, for intentional and/or negligent infliction of emotional harm, and for negligence.

5. Upon reviewing the discovery materials provided by all Defendants on or about October 30, 2007 and upon further reflection of the facts and further investigation and analysis of the file, it is clear that plaintiff must amend his Complaint so that same is accurate.

6. This amendment is in relation to defendant OFFICERS listed in the case caption to include their full names and shield numbers, to remove Officer Nieves from the suit, and to replace Officer John Doe 1 and 2 with the appropriate officers names of Officer Victor Rivera and Officer Kimberly Gannaway, all of which does not affect the underlying substance of the original complaint.

7. With the addition of two parties, previously listed as John Doe 1 and 2, and the clarification of Captain Jose Vasquez as the appropriate party to be served, the plaintiff requests the Court enlarge the time for plaintiff to serve relevant parties pursuant to FRCP 4(m). Plaintiff was unable to ascertain the names of those involved in the incident until receipt of New York City Department of Corrections internal documents, which could not be obtained until the discovery stage of the proceeding.

8. This enlargement of time would not prejudice the defendants, as the City of New York has previously been served, and Plaintiff contends as the OFFICERS' employer it would be the sufficient party to receive service for all defendants. Further, it would not cause a delay in the case, as the defendant CITY is on notice, and currently in the position to represent defendant

OFFICERS.

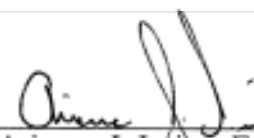
9. Amending the complaint in this case does not prejudice or surprise the defendants in any way.

10. The plaintiff has fully and fairly stated the facts and has good and meritorious causes of action.

11. Deponent has spoken with counsel having appeared for all defendants, and defendants consent to plaintiff's request to amend the complaint and to enlarge the time for service of the amended summons and complaint.

12. Your deponent therefore respectfully prays that an order be made permitting him to serve an amended complaint in accordance with the annexed proposed amended complaint and enlarge the time to serve additional defendants, while allowing the case to retain its present position on the calendar.

Dated: November 8, 2007


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